



**U.S. Citizenship  
and Immigration  
Services**

**Non-Precedent Decision of the  
Administrative Appeals Office**

MATTER OF G-D-M- INC.

DATE: DEC. 21, 2016

APPEAL OF NEBRASKA SERVICE CENTER DECISION

PETITION: FORM I-140, IMMIGRANT PETITION FOR ALIEN WORKER

The Petitioner, a provider of software development services, seeks to employ the Beneficiary as a senior programmer analyst. It requests classification of the Beneficiary as a member of the professions holding an advanced degree under the second preference immigrant classification. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). This employment-based immigrant classification allows a U.S. employer to sponsor a professional with an advanced degree for lawful permanent resident status.

The Director, Nebraska Service Center, denied the petition. The Director concluded that the record did not establish the Beneficiary's possession of the minimum required education for the offered position or the requested classification. The Director also found that the record did not establish the Petitioner's ability to pay the proffered wage.

The matter is now before us on appeal. The Petitioner claims that the Beneficiary possesses the minimum education required, based on a combination of education and experience, and therefore meets the requirements of the offered position and the requested classification. However, as set forth below, neither the offered position nor the advanced degree classification allow for a combination of education and experience such as that possessed by the Beneficiary. The Petitioner further states that it has demonstrated its ability to pay the Beneficiary the proffered wage. But, as discussed below, the Petitioner did not submit relevant information related to its multiple filed petitions.

Upon *de novo* review, we will therefore dismiss the appeal.

## **I. LAW AND ANALYSIS**

### **A. USCIS' Role in the Employment-Based Immigration Process**

Employment-based immigration is generally a three-step process. First, a U.S. employer must obtain an approved ETA Form 9089, Application for Permanent Employment Certification (labor certification), from the U.S. Department of Labor (DOL). *See* section 212(a)(5)(A)(i) of the Act, 8 U.S.C. § 1182(a)(5)(A)(i). Next, the employer files Form I-140, Immigrant Petition for Alien Worker, with U.S. Citizenship and Immigration Services (USCIS). *See* section 204 of the Act, 8

U.S.C. § 1154. If the Form I-140 is approved, the foreign national may apply for an immigrant visa abroad or, if eligible, adjustment of status in the United States. See section 245 of the Act, 8 U.S.C. § 1255.

By approving the labor certification in this case, the DOL certified that there are insufficient U.S. workers who are able, willing, qualified, and available for the offered position of senior programmer analyst. See section 212(a)(5)(A)(i)(I) of the Act. The DOL also certified that the employment of a foreign national in the position will not adversely affect the wages and working conditions of domestic workers similarly employed. See section 212(a)(5)(A)(i)(II).

In these proceedings, we must determine whether the Beneficiary meets the requirements of the offered position certified by the DOL. We must also determine whether the Petitioner and the Beneficiary otherwise qualify for the requested immigrant classification. See, e.g., *Tongatapu Woodcraft Haw., Ltd. v Feldman*, 736 F.2d 1305, 1309 (9th Cir. 1984) (holding that the immigration service “makes its own determination of the alien’s entitlement to [the requested] preference status”).

#### B. The Beneficiary’s Possession of the Required Educational Credentials

Here, the Petitioner is requesting classification of the Beneficiary as a member of the professions holding an advanced degree. See section 203(b)(2)(A) of the Act; see also 8 C.F.R. § 204.5(k)(1). The petition must therefore be accompanied by a valid labor certification demonstrating “that the job requires a professional holding an advanced degree or its equivalent.” 8 C.F.R. § 204.5(k)(4)(i). The term “advanced degree” means “any United States academic or professional degree or a foreign equivalent degree above that of a baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree.” 8 C.F.R. § 204.5(k)(2).

In addition, the Beneficiary must possess an advanced degree, see 8 C.F.R. § 204.5(k)(3), and must meet all of the requirements of the offered position specified on the labor certification by the petition’s priority date. 8 C.F.R. §§ 103.2(b)(1), (12); see also *Matter of Wing’s Tea House*, 16 I&N Dec. 158, 159 (Acting Reg’l Comm’r 1977); *Matter of Katigbak*, 14 I&N Dec. 45, 49 (Reg’l Comm’r 1971).

In this case, the petition’s priority date is April 23, 2015. This is the date that the DOL accepted the labor certification application for processing. See 8 C.F.R. § 204.5(d) (explaining how to determine a petition’s priority date).

The labor certification states the minimum educational requirements of the offered position of senior programmer analyst as a U.S. bachelor’s degree or a foreign equivalent degree in “[c]omputers/electronics/electrical” or a related field of study. The labor certification also states that the offered position requires at least 60 months of experience in the job offered or as a programmer analyst, software engineer, IT analyst, tech lead, project lead or a related occupation. The labor certification states that “No” alternate combination of education and experience is acceptable.

*Matter of G-D-M- Inc.*

In evaluating a beneficiary's qualifications, we must examine the job offer portion of a labor certification to determine the minimum requirements of an offered position. We may neither ignore a term of the labor certification, nor impose additional requirements. See *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1009 (9th Cir. 1983); *Madany v. Smith*, 696 F.2d 1008, 1012-13 (D.C. Cir. 1983); *Stewart Infra-Red Commissary of Mass., Inc. v. Coomey*, 661 F.2 1, 3 (1st Cir. 1981).

At issue here is whether the Beneficiary has the required level of education. The plain language of the labor certification states the minimum educational requirements of the offered position as a U.S. bachelor's degree or a foreign equivalent degree. Specifically, part H.4 of the labor certification states that the offered position requires a U.S. "Bachelor's" degree, rather than an "Associate's" degree or some "Other" educational credential. Part H.9 of the form states the acceptability of a foreign equivalent degree, while part H.8 of the form states that "No" alternate combination of education and experience is acceptable. Part H.14 of the form does not state any "[s]pecific skills or other requirements."

The Beneficiary attested on the labor certification to his receipt of a bachelor's degree in science from [REDACTED] in India in 1998. The record contains a copy of a bachelor of science diploma from the university and accompanying marks statements, which indicate the Beneficiary's completion of a 3-year, baccalaureate program.

The Petitioner submitted an evaluation of the Beneficiary's foreign credentials, which states that the Beneficiary's bachelor of science degree equates to 3 years of university studies in the United States. The evaluation also discusses the Beneficiary's possession of more than 12 years of employment experience in the computer information systems field. Combining the Beneficiary's 3-year degree with his employment experience, the evaluation concludes that the Beneficiary has the equivalent of a U.S. bachelor of science degree in computer information systems.

Therefore, the record establishes the Beneficiary's possession of a 3-year, bachelor of science degree. But U.S. bachelor's degrees generally require 4 years of university or college study. *Matter of Shah*, 17 I&N Dec. 244, 245 (Reg'l Comm'r 1977). Thus, as the evaluation submitted by the Petitioner indicates, the Beneficiary's bachelor of science degree is not the foreign degree equivalent of a U.S. bachelor's degree. Rather, the Petitioner attempts to establish that the Beneficiary has the equivalent level of education of a U.S. bachelor's degree by combining his 3-year degree with experience.

As noted above, the labor certification's requirements do not indicate the Petitioner's acceptance of a U.S. bachelor's degree equivalency based on a combination of education and experience, such as that possessed by the Beneficiary. Rather, the labor certification states that the offered position requires the possession of at least a single, U.S. bachelor's degree or a foreign equivalent degree. No alternate combination of education and experience was listed as acceptable. As the Beneficiary does not have the degree required, but is instead attempting to qualify for the position based on a

3-year degree combined with employment experience, the record does not establish the Beneficiary's possession of the minimum education required by the terms of the labor certification.

Also, as stated in the Director's decision, the Act and its legislative history indicate that an advanced degree professional must possess at least a bachelor's degree without combining education and experience. In response to complaints that the immigrant visa regulations bar the substitution of experience for education, the former Immigration and Naturalization Service (INS) reviewed the Immigration Act of 1990. The INS found that "both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, an alien must have at least a bachelor's degree." 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991); *see also SnapNames.com v. Chertoff*, No. CV 06-65-MO, 2006 WL 3491005, \*\*10-11 (D. Or. Nov. 30, 2006) (holding that USCIS properly concludes that classification as a professional or advanced degree professional requires a single degree equivalent to a baccalaureate). The Beneficiary's claimed possession of the "equivalent" level of education of a U.S. bachelor's degree based on a combination of education and experience is insufficient to establish his qualifications for advanced degree professional classification.

Thus, based on the plain language of the labor certification, the record does not establish the Beneficiary's possession of the educational credentials required for the offered position. Also, based on the Act and its legislative history, the record does not establish the Beneficiary's possession of the minimum education required for the requested classification of advanced degree professional.

On appeal, the Petitioner notes that no single, U.S. authority recognizes foreign educational credentials or equivalencies, and that some U.S. students obtain bachelor's degrees in less than 4 years or after transferring credits from other schools or programs.

We acknowledge that the opinions of education evaluators may differ. But the only evaluation submitted by the Petitioner indicates that the Beneficiary's 3-year degree equates to a U.S. bachelor's degree only when combined with his employment experience. Because the labor certification and advanced degree regulations do not allow for such a combination of education and experience, the record does not establish the Beneficiary's possession of the minimum education required for the offered position and the requested classification.

We also acknowledge that some U.S. students obtain bachelor's degrees after less than 4 years of studies or after transferring credits from prior schools. However, in the case of degree programs lasting less than 4 years, those U.S. baccalaureate programs are condensed programs and result in a degree that is equivalent to a U.S. 4-year bachelor's degree. Where transfer credits are used, we look at the resulting degree credential, which if determined to be equivalent to a 4-year U.S. bachelor's degree, could be considered. Here, the record does not establish that the Beneficiary attended a condensed degree program that resulted in a degree equivalent to a 4-year U.S. bachelor's degree, or his possession of prior transfer credits. Rather, the record indicates that the Beneficiary's only post-secondary education consists of his 3-year bachelor's degree, which the Petitioner's own evaluation states equates to 3 years of U.S. college or university studies, not to a U.S. bachelor's degree. The

Petitioner's statements on appeal therefore do not establish the Beneficiary's possession of the required education.

For the foregoing reasons, the record does not establish the Beneficiary's possession of the educational credentials required for the offered position or the requested classification of advanced degree professional.

C. The Petitioner's Ability to Pay the Proffered Wage

A petitioner must demonstrate its continuing ability to pay a proffered wage from a petition's priority date until a beneficiary obtains lawful permanent residence. 8 C.F.R. § 204.5(g)(2). Initial evidence of ability to pay must include copies of annual reports, federal income tax returns, or audited financial statements. *Id.*

In this case, the labor certification states the proffered wage of the offered position of senior programmer analyst as \$109,000 per year. As previously indicated, the petition's priority date is April 23, 2015. Because required, initial evidence of the Petitioner's ability to pay the proffered wage in 2016 was unavailable at the time of the appeal's filing, we will consider the Petitioner's ability to pay only in 2015, the year of the petition's priority date.

In determining ability to pay, we examine whether a petitioner paid a beneficiary the full proffered wage each year from a petition's priority date. If a petitioner did not pay the full proffered wage each year, we consider whether it generated sufficient, annual amounts of net income or net current assets to pay any differences between the proffered wage and the wages paid. If a petitioner's net income or net current assets are insufficient, we may also consider the overall magnitude of its business activities. *See Matter of Sonagawa*, 12 I&N Dec. 612, 614-15 (Reg'l Comm'r 1967).<sup>1</sup>

Here, the Petitioner submitted a copy of an IRS Form W-2, Wage and Tax Statement, for 2015, showing the Petitioner's payment to the Beneficiary that year of \$81,964.30. The amount on the Form W-2 does not equal or exceed the annual proffered wage of \$109,000. The record therefore does not establish the Petitioner's ability to pay the proffered wage based on its payments to the Beneficiary. Nevertheless, we credit the Petitioner's payments to the Beneficiary. The Petitioner need only demonstrate its ability to pay the difference between the annual proffered wage and the amount paid to the Beneficiary, or \$27,035.70.

A copy of the Petitioner's federal income tax return for 2015 reflects net income of \$118,517. The net income amount on the tax return exceeds the \$27,035.70 difference between the annual proffered wage and the amount paid to the Beneficiary, indicating that the Petitioner's ability to pay the

---

<sup>1</sup> Federal courts have upheld our method of determining a petitioner's ability to pay a proffered wage. *See, e.g., River St. Donuts, LLC v. Napolitano*, 558 F.3d 111, 118 (1st Cir. 2009); *Estrada-Hernandez v. Holder*, 108 F. Supp. 3d 936, 942-43 (S.D. Cal. 2015); *Rivzi v. Dep't of Homeland Sec.*, 37 F. Supp. 3d 870, 883-84 (S.D. Tex. 2014), *aff'd*, 627 Fed. App'x. 292 (5th Cir. 2015); *Just Bagels Mfg., Inc. v. Mayorkas*, 900 F. Supp. 2d 363, 373-76 (S.D.N.Y. 2012).

*Matter of G-D-M- Inc.*

proffered wage in this case. However, as stated in the Director's notice of intent to deny (NOID), USCIS records indicate the Petitioner's filing of multiple Form I-140 petitions. USCIS records indicate the Petitioner's filing of at least nine I-140 petitions for other beneficiaries after this petition's priority date.<sup>2</sup>

A petitioner must demonstrate its ability to pay the proffered wage of each petition it files from the petition's priority date. 8 C.F.R. § 204.5(g)(2). The Petitioner here must therefore demonstrate its ability to pay the combined proffered wages of this petition and other petitions it has filed. The Petitioner must demonstrate its ability to pay the combined proffered wages of all sponsored beneficiaries from this petition's priority date until the beneficiaries of the other petitions obtained lawful permanent residence, or until their petitions were denied, withdrawn, or revoked. *See Patel v. Johnson*, 2 F. Supp. 3d 108, 124 (D. Mass. 2014) (upholding our denial of a petition where a petitioner did not establish its ability to pay the combined proffered wages of multiple, pending beneficiaries).

The Director's NOID requested information concerning the proffered wages owed to all sponsored beneficiaries, as well as information about the priority dates of the other filed petitions and the status of the other sponsored beneficiaries, in order to fully analyze the Petitioner's ability to pay the proffered wage. In response to the Director's NOID and on appeal, the Petitioner did not provide information about the petitions it filed after this petition's priority date. The record does not indicate the priority dates or proffered wages of the petitions, or whether the Petitioner paid these beneficiaries. The record also does not indicate whether any of the beneficiaries obtained lawful permanent residence or whether any of the petitions were denied, withdrawn, or revoked. Without this information, we cannot determine that the Petitioner has the ability to pay the proffered wage.

As previously indicated, we may also consider a petitioner's ability to pay a proffered wage beyond the financial information stated on its tax returns. As in *Sonegawa*, we may consider such factors as: the number of years a petitioner has conducted business; the growth of its business; its number of employees; the occurrence of any uncharacteristic business expenditures or losses; its reputation in its industry; whether a beneficiary will replace a current employee or outsourced service; or other evidence of a petitioner's ability to pay. *See Sonegawa*, 12 I&N Dec. at 614-15.

In this case, the record indicates the Petitioner's continuous business operations since 2008 and its employment of 57 people at the time of the petition's filing. Copies of the Petitioner's federal income tax returns reflect increases in its annual revenues from 2014 to 2015. The Petitioner's director also stated that its revenues and amounts of salaries and wages paid increased from 2011 to 2014. Unlike in *Sonegawa*, however, the record does not indicate the Petitioner's incurrence of any uncharacteristic business expenditures or losses, or the Petitioner's outstanding reputation in its field. The record also does not indicate that the Beneficiary will replace a current employee or outsourced service. Also unlike in *Sonegawa*, the Petitioner here must demonstrate its ability to pay the

<sup>2</sup> USCIS records identify the other I-140 petitions by the following receipt numbers: [REDACTED]

[REDACTED] and [REDACTED]

proffered wages of multiple petitions and did not submit requested information regarding these petitions. See 8 C.F.R. § 103.2(b)(14) (authorizing USCIS to deny a petition if a petitioner does not submit requested evidence that precludes a material line of inquiry).

On appeal, the Petitioner asserts that the Director should have consider its amounts of “paid up capital” and retained earnings in 2014 and 2015 as part of the totality of circumstances analysis. The Petitioner’s federal income tax returns reflect unappropriated retained earnings of \$232,172 at the end of 2014 and \$314,112 at the end of 2015. The Petitioner also asserts paid up capital of \$78,000 at the end of 2014 and \$118,517 at the end of 2015.

Paid-up or paid-in capital refers to capital received from investors in exchange for stock, while retained earnings reflect a corporation’s accumulated earnings from its inception, minus any dividends paid. Joel G. Siegel & Jae K. Shim, *Barron’s Dictionary of Accounting Terms* 378 (3d ed. 2000). These components of shareholder equity, however, generally represent non-cash values of assets that a corporation cannot liquidate during the normal course of business. See *Sitar Rest. v. Ashcroft*, No.Civ.A.02-30197-MAP, 2003 WL 22203713, \*4 (D. Mass. Sept. 18, 2003) (holding that a petitioner’s unappropriated retained earnings need not be considered in determining its ability to pay a proffered wage). Because the record does not establish that the corporation’s shareholder equity was available to pay the proffered wage, the Director did not err by declining to consider the Petitioner’s amounts of paid-in capital and retained earnings.

Thus, a review of the totality of the circumstances pursuant to *Sonegawa* in this case does not establish the Petitioner’s ability to pay the proffered wage. For the foregoing reasons, the record does not establish the Petitioner’s continuing ability to pay the proffered wage from the petition’s priority date onward.

## II. CONCLUSION

The record does not establish the Beneficiary’s possession of the educational credentials required for the offered position or the requested classification of advanced degree professional. The record also does not establish the Petitioner’s continuing ability to pay the proffered wage from the petition’s priority date onward.

The petition will remain denied for the above-stated reasons, with each considered an independent and alternate ground of denial. In visa petition proceedings, a petitioner bears the burden of establishing eligibility for a requested benefit. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). Here, the Petitioner did not meet that burden.

**ORDER:** The appeal is dismissed.

Cite as *Matter of G-D-M- Inc.*, ID# 86144 (AAO Dec. 21, 2016)